Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/19641/2013
OA/19645/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27 November 2014	**On 1 December 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

BG
BR
[Anonymity direction made]

Appellants

and

The Entry Clearance Officer New Delhi

Respondent

Representation:

For the appellants: Mr M M Puar, instructed by NC Brothers & Co Solicitors
For the respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, BG, date of birth 18.12.89, is a citizen of Nepal. It is now claimed that her son, BR, date of birth 7.4.10, is either a British citizen or entitled to British nationality.

2. These are their linked appeals against the determination of First-tier Tribunal Judge Clarke promulgated 25.7.14, dismissing their appeals against the decision of the respondent, dated 1.10.13, to refuse their applications made on 1.8.13 for entry clearance to the United Kingdom to settle as the spouse and son, respectively, of DR, a British citizen present in the UK. The Judge heard the appeal on 10.7.14.

3. First-tier Tribunal Judge Ransley granted permission to appeal on 15.10.14.

4. Thus the matter came before me on 27.11.14 as an appeal in the Upper Tribunal.

5. Following the submissions of both Mr Puar and Mr Avery, Mr Puar sought at that late stage to add further grounds of appeal. I refused his application, bearing in mind that we were part-way through the hearing and there had been ample opportunity in the months since the First-tier Tribunal appeal hearing to apply to add further grounds of appeal. No explanation was offered as to why that was not done and I therefore refused the application, conscious that the Secretary of State's representative would have had no opportunity to consider or address the further grounds of appeal. In the circumstances, I considered it was in the public interest to proceed with the appeal hearing on the grounds advanced when seeking permission to appeal.

6. In his submissions Mr Puar alleged that certain documents had been handed in to the First-tier Tribunal Judge at the appeal hearing. However, no such documents were with the case papers and considering the careful way in which the judge set out the evidence received and taken into account at §5 and §10-§13, and absence of any admissible evidence that the documents were placed before the judge, I am not satisfied that those documents were before the First-tier Tribunal Judge and thus refused to consider them in the error of law consideration.

Error of Law

7. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Clarke should be set aside.

8. The essence of the grounds of application for permission to appeal contend that the second appellant was entitled to British citizenship as of right and thus the judge's assessment of the financial threshold required under Appendix FM was in error, and that the proportionality assessment was in consequence so flawed that the decision cannot stand and must be set aside.

9. In granting permission to appeal, Judge Ransley summarised the grounds of appeal and simply that that the decision had been shown to involve arguable errors of law thus permission to appeal was granted.

10. The Rule 24 response, dated 14.11.14, noted that the judge was not aware of the second appellant's claimed nationality, and as it was not drawn to the judge's attention, it cannot be an error of law for the judge not to have proceeded on that

basis. "The judge was not persuaded by the specified evidence and was further not convinced that the sponsor gave a credible account of various matters. No material errors of law are identified. It remains open to the appellants to make further application as required."

11. It is regrettable that at no stage prior to the application for permission to appeal to the Upper Tribunal was the claimed nationality of the second appellant drawn to the respondent or the Tribunal's attention. It was not identified at the application, refusal decision, or appeal stage. It is clear that the First-tier Tribunal Judge proceeded on the basis that the second appellant was a citizen of Nepal. The judge was aware, from §11 of the decision, that the sponsor's certificate of registration as a British citizen was included in the appeal bundle.

12. The grounds allege and permission to appeal was granted on the basis that the nationality of the second appellant was a Robinson obvious point, as he was born after the sponsor was registered as a British citizen. If this is correct and an error of law, it follows that both the financial threshold for Appendix FM was incorrectly stated, since a British citizen child is not to be added to the £18,600 income requirement for a couple, and that the proportionality assessment would be entirely skewed as it failed to take into account the claimed nationality of the second appellant.

13. Whilst the second appellant may well be entitled to claim British citizenship, it is not clear to me that he is a British citizen until that right has been asserted and granted. It is evident that the second appellant does not have a British passport and has never applied for one. I am wrong on that point, as Mr Puar asserted, the crucial issue is whether a material mistake of fact that is not the fault of the judge and was not drawn to his attention at any time can be regarded as an error of law requiring the decision to be set aside and remade by allowing the appeal to the extent that the decision of the Entry Clearance Officer was also made on an erroneous basis and thus was not in accordance with the law and thus it remains for the Entry Clearance Officer to make a decision which is in accordance with the law.

14. In R and Others v SSHD [2005] EWCA Civ 982, Lord Justice Brooke summarised the points of law which would be encountered most frequently in practice as follows: (i) making perverse or irrational findings on matters that were material to the outcome (ii) failure to give reasons or any adequate reasons for findings on material matters (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters (iv) giving weight to immaterial matters (v) making a material misdirection of law on any material matter (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or fairness of the proceedings (vii) making a mistake as to a material fact which could be established by objective and uncontentious evidence when the appellant and/or his advisors were not responsible for the mistake and where unfairness resulted from the fact that a mistake was made.

15. On this issue it cannot be said that the decision of the judge, made on the assumption that the second appellant was a citizen of Nepal, was perverse or irrational, or that it was unreasoned, or took account of immaterial matters. If the second appellant is a British citizen, it may well be a mistake as to a material fact which could be established by objective and uncontentious evidence, but the fact remains that there was evidence as to the second appellant having Nepalese nationality. That was what was placed before the judge. Further, the responsibility for such a mistake must lie entirely with the appellant or his legal advisors; the judge cannot be expected to raise an issue that no one else has relied on. I do not accept that it is a Robinson obvious matter. Mr Avery suggested that the decision was not unfair as it was open to the first appellant to make a fresh application once the second appellant's nationality was clarified, and the very nature of the application may well be different to that made. It also occurs to me that there can be no unfairness to the second appellant in any event, as if he is a British citizen, he does not need leave to enter the UK and may do so once he has obtained a passport to confirm his British nationality.

16. In AH (Eritrea) [2005] UKIAT 00015 the Appellant applied to enter the UK as a visitor for his daughter's wedding. On appeal he mistakenly ticked the box indicating that he wanted the appeal determined on the papers, yet ticked the box asking that his daughter be notified of the hearing date. The Tribunal said that a mistake of fact giving rise to unfairness, for which neither the claimant nor his advisors was responsible, was required as per E and R [2004] EWCA Civ 49 for there to be a material error of law. In that case, even if there had been a mistake, the Appellant was responsible for it. He could make a fresh application and his appeal was dismissed.

17. In the circumstances and in the light of the case law referred to above, I find that whilst there may have been a mistake of fact giving rise to potential unfairness, the error was the responsibility of the appellants and/or their legal advisors, and not the responsibility of the Tribunal. Whilst I have given anxious consideration as to the issue of fairness and the further delay that may be occasioned, I find that the correct remedy is not to send the case all the way back to the Secretary of State to remake the decision, which may result in yet further delay, but for the second appellant to clarify his nationality with the relevant authorities and, on the assumption that he is either a British citizen or entitled to British citizenship, the first appellant may then make a fresh application for entry clearance.

Conclusions:

18. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal of each appellant remains dismissed on immigration and human rights grounds.

Signed: Date: 27 November 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I continue the anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeals have been dismissed and thus there can be no fee award.

Signed: Date: 27 November 2014

Deputy Upper Tribunal Judge Pickup